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SUBJECT: Brazil: Investment Agreement Principles - consolidated GOB feedback

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¶1. (SBU) SUMMARY: This message provides consolidated input to Washington agencies regarding the status of intra-GOB discussions on bilateral investment treaty principles. While no treaty "text" comparable to the US model BIT exists, CAMEX (the Brazilian External Trade Chamber) member ministries have developed "principles" for investment treaty/investment FTA chapter negotiations. MRE, MDIC, and Planning Ministry as well as CAMEX Secretariat contacts characterize these "principles" as the final GOB position going forward in negotiations with other countries, while Finance Ministry indicates the internal battle is not over and that it continues to push for more ambitious principles than MRE desires. Ministries confirm the principles include only state to state dispute resolution, and in a recent meeting with CEO Forum co-chair Tim Solso and Brazilian CEO Forum members (septel), Casa Civil Dilma Rousseff indicated it would be difficult for GOB to consider arbitration mechanisms beyond those included in specific contract provisions. Most interlocutors note that GOB wishes to negotiate first 1) with an "easy" low economic impact country and/or 2) within the region in order to gauge Brazilian Congressional reaction before tackling more ambitious negotiations. END SUMMARY.

¶2. (SBU) Post has explored over the past months with member Ministries of CAMEX (the External Trade Chamber) the GOB's position on bilateral investment treaties, including specifically on potential mechanisms for international arbitration of investor disputes. Interlocutors have included Casa Civil Dilma Rousseff, MDIC Minister Jorge and staff, Finance Ministry Chief of Staff Melin, the Planning Ministry's chief economist Alex Pereira, MRE's head of investment and services Costa and U/S Azevedo, and CAMEX Executive Secretary Lytha Spinola.

¶3. (U) NOTE: CAMEX is in some ways comparable to the USG TPSC/TPRG/Econ Deputies/Econ Principals process. Membership is composed of MDIC (Commerce Ministry), Casa Civil (President's staff), MRE (Foreign Relations Ministry), Finance, Agriculture, Planning, and Agriculture Development Ministries. CAMEX has an Executive Secretariat, and Lytha Spindola is the Executive Secretary. CAMEX work is done in working groups progressively up

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through a Council of Ministers that takes decisions. While TPRG process is a good comparison, CAMEX actually has a broader mandate since it is responsible for decisions on: trade defense measures; trade facilitation; common external tariff changes decisions; export guarantees; international negotiations; and trade security. That is, CAMEX does everything from approving anti-dumping cases to

green-lighting MRE's proposed WTO negotiating positions to setting tariff rates. Like our system, some issues are "easy" and never rise to political level for debate while others receive high-level engagement. END NOTE

¶4. (SBU) Reftel C reports in detail Congressional political, rather than Constitutional, concerns regarding BITs, as well as MRE's interpretation of its mandate from CAMEX going forward. Contacts in the CAMEX Secretariat as well as Planning, Finance and MDIC ministries have declined to share any written record of the CAMEX investment negotiation principles - MRE, Planning and MDIC on the grounds that these "final" principles are internal use only and Finance also on the grounds that Ministries continue to debate internally the principles' ambition level and with what countries GOB should be negotiating. Ministry and CAMEX contacts all confirm that the principles currently address only state to state arbitration; investor-state international arbitration is not included as an investment treaty principle.

¶5. (SBU) Ministries/CAMEX secretariat are consistent in their understanding that GOB currently intends to focus investment negotiations based on these principles on countries where FTA negotiations are already underway or where the level of ambition is low and where the country is close by (eg, small Latin American neighbors). Ref C notes that MRE interprets the mandate to prioritize negotiating investment agreements as part of FTAs rather than as free-standing agreements. No interlocutor believed that Brazil realistically would be ready or desire to negotiate with the United States anytime soon on either a bilateral investment treaty or on a discrete international arbitration mechanism, citing as reasons the political difficulties with the Brazilian congress and the high-profile, ambitious nature of any negotiation with a high economic value investment partner such as the United States. In a February 20 meeting with CEO Forum Co-Chair Tim Solso and several Brazilian CEO Forum representatives, MDIC Minister Miguel Jorge acknowledged that at some point GOB should discuss and consider further the possibilities for international arbitration, while Casa

Civil Dilma Rousseff believed existing mechanisms for resolving disputes through specific contract provisions were sufficient, had been successful in her Petrobras experience, and that anything further would be difficult to achieve (septel).

¶6. (SBU) Only Finance Ministry discussions indicated a firm desire for more ambition at this point. The Chief of staff, noting that "everyone is very concerned about putting a foot wrong on the first "model"" investment agreement and recalling that a "vague reference" to dispute settlement had created a furor that had risked holding up the Mercosul/Chile FTA, nonetheless expressed impatience at least to begin negotiations with Argentina on investment protections within MERCOSUL. He estimated there would be no actual draft GOB investment chapter/agreement "text" before August. He claimed Finance is pushing hard for an explicit reference to an investor-state dispute resolution mechanism in the principles and to induce other CAMEX members (with a strong implied reference to MRE) to accept that a "one-size fits all" negotiating approach will not work as Brazil evolves into a country with offensive as well as defensive interests. He underlined that Argentina is Finance's top priority for an investment agreement, due to the perception of Brazilian investors that GOA actively devises ways to disadvantage them.

¶7. (U) Further to information provided reftels, MRE's Investment and Services office, led by Ronaldo Costa Filho, provided post with the following informational text on February 15th:

BEGIN QUOTE: Foreign Arbitrage (sic - arbitration) Awards Recognition

Article 34 of the Brazilian Law 9.307 of 1996 defines a foreign arbitrage (sic - arbitration) sentence as the sentence proffered outside national territory. Before that Law, foreign sentences had to be recognized twice by the judicial system, first in the foreign Country where it had been issued and later in Brazil. The Law established that it sufficed the recognition in Brazil. The

Constitutional Amendment No 45, in 1994, attributed the competence to recognize foreign sentences, previously held by the Superior Court of Justice (STJ), to the Federal Supreme Court (STF).

Law 9.307 also stipulates that the foreign sentence will [b]e recognized or executed in Brazil in conformity with the international agreements ratified by the Country and, in their absence, with domestic law. Since the promulgation of that Law, Brazil has ratified the three main multilateral agreements on the subject: 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitrage Awards (New York Convention), ratified in 2002; 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention), ratified in 1996; 1979 Inter-American Convention on Extraterritorial Efficacy of Foreign Sentences and Arbitration Awards (Montevideo Convention), ratified in 1997.

According to a recent research elaborated by a Brazilian Law Firm mentioned in the May 20, 2007 edition of Valor [note - a Brazilian newspaper - end note], during the last 10 years 408 arbitrage awards were taken to the Brazilian judicial system. Only 15 of those were foreign arbitrage awards, 5 of which were not recognized by the Brazilian tribunals.

Arbitrage awards, once submitted to the STJ, are subject to the Brazilian process laws, as any other juridical action analyzed by that Tribunal.

It should be noted that the vast majority of the countries, including France, UK, USA and Italy, also demand that their judicial system recognize the foreign sentence in order to execute them in their territory. END QUOTE

¶8. (SBU) COMMENT: As previously noted refs, given Brazil's history with investment agreements, GOB is extremely cautious and overall appears disinclined to ambition in discussion with the United States in the short-term. Post encourages further Washington/GOB technical discussions on possible cooperative approaches to increase mutual understanding of goals in concluding investment agreements and mechanisms. Post believes intense Brazilian investor lobbying on the Brazilian congress and executive for negotiations would be a crucial component in any strategy to foster achievement of an ambitious result in the short-term. (NOTE: While CNI, for example, has told the Ambassador again recently that it is "studying" investment protection this year in a working group and is considering its strategy, they too express caution on ambition level given court and congressional challenges (see also ref D)). END

COMMENT

SOBEL